

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, RSC 1985, c C-34 (the “Act”);

AND IN THE MATTER OF an application by Stargrove Entertainment Inc. for an order pursuant to section 103.1 of the *Act* granting leave to bring an application under sections 75, 76, and 77 of the Act;

AND IN THE MATTER OF an application by Stargrove Entertainment Inc. for an order pursuant to sections 75, 76, and 77 of the Act;

AND IN THE MATTER OF an application by Stargrove Entertainment Inc. for an order pursuant to section 104 of the Act;

B E T W E E N:

STARGROVE ENTERTAINMENT INC.

Applicant

- and -

UNIVERSAL MUSIC PUBLISHING GROUP CANADA,

UNIVERSAL MUSIC CANADA INC.,

SONY/ATV MUSIC PUBLISHING CANADA CO.,

SONY MUSIC ENTERTAINMENT CANADA INC.,

ABKCO MUSIC & RECORDS, INC.,

CASABLANCA MEDIA PUBLISHING, and

CANADIAN MUSICAL REPRODUCTION RIGHTS

AGENCY LTD.

Respondents

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT April 4, 2016 CT-2015-014 Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 37

RESPONSE
of
ABKCO Music & Records, Inc.

I RESPONSE TO STARGROVE'S STATEMENT OF GROUNDS AND MATERIAL FACTS

1. Except as expressly admitted herein, ABKCO Music & Records Inc. ("AMR") denies each and every ground asserted by Stargrove and each and every allegation in Stargrove's Statement of Grounds and Material Facts.

II MATERIAL FACTS RELIED ON BY ABKCO

A. ABKCO Music & Records, Inc. and ABKCO Music, Inc.

2. ABKCO Music, Inc. ("AMI") is a wholly-owned subsidiary of ABKCO Music & Records, Inc. ("AMR") (collectively, "ABKCO").

3. AMR is an independent record label.

4. AMI is a music publisher. As such, it owns or administers copyrights in musical works.

B. ABKCO's Songs

5. AMI (not AMR) owns the worldwide copyrights to the following songs for which Stargrove sought mechanical licences (collectively, the "ABKCO Songs"):

- a) "Heart of Stone" (Jagger/Richards)
- b) "What A Shame" (Jagger/Richards)
- c) "Good Times Bad Times" (Jagger/Richards)
- d) "It's All Over Now" (Womack/Womack)
- e) "Grown Up Wrong" (Jagger/Richards)

6. Apart from the five ABKCO Songs, neither AMI nor AMR owns any rights whatsoever to any of the musical works referred to in the Amended Notice of Application and Statement of Grounds and Material Facts, or the Affidavit of Terry Perusini, sworn August 26, 2015, ("Application Materials") submitted by the applicant Stargrove Entertainment Inc. ("Stargrove") (the "Subject Musical Works").

7. AMR (not AMI) owns the master recordings of the ABKCO Songs.

C. ABKCO and CMRRA

8. AMI has retained the Canadian Musical Reproduction Rights Agency (“CMRRA”) as its agent for granting licences for reproduction of musical works (commonly referred to as “mechanical licences”) in Canada to musical works owned by AMI.

9. AMI does not offer mechanical licences in Canada at CMRRA’s standard rate however. Instead, AMI charges \$0.13 per copy manufactured for songs under five minutes, and \$0.026 per minute per copy for songs over five minutes.

10. AMI retains the right to instruct CMRRA to refuse to grant a mechanical licence to any particular musical work or to any particular person.

D. Copyright in musical works and mechanical licences

11. Any given music CD will embody a number of works that are subject to copyrights:

- a) Musical work: the author (or authors) of the musical work itself, that is, the words and music that together comprise the song (or other musical work) have a copyright in the musical work. This copyright lasts for the life of the last living author plus fifty years.
- b) Performer’s performance: each performer has a copyright in their performance which is fixed on the CD. This copyright lasts for fifty years after the end of the calendar year in which the first fixation of the performance in a sound recording occurs.
- c) Sound recordings: the maker of the sound recording has a copyright in the sound recording. In most cases, this copyright lasts for seventy years after the end of the calendar year in which the first publication of the sound recording occurs. The term of this copyright was extended in 2015 from fifty years to seventy years. The 2015 amendments did not restore copyright protection to recordings that had already fallen into the public domain, however.
- d) Compilation: the compilation of musical works on the CD, that is, the choice and order of musical works on the CD, is subject to copyright.

- e) Artwork and liner notes: any artwork on the liner or the CD itself is subject to copyright, as are the liner notes.
12. Any music label wishing to produce copies of a CD must obtain licences for each of the copyrights associated with the works that it wishes to reproduce.
13. In particular, the label must obtain a licence from the author of the musical work (or the person who administers or owns the author's copyright) to make copies of the musical work on the CD. This is the case whether the label intends to make copies of an existing recording of the musical work, or to make copies of a new recording by a band that is "covering" the work. This licence is referred to as a "mechanical licence".

E. Stargrove's business model

14. Stargrove's business model appears to involve producing CDs containing recordings that meet the following characteristics:
- a) The copyright over the sound recording has fallen into the public domain
 - b) The copyright over the performers' performances have fallen into the public domain
 - c) The author's copyright over the musical work is still in force.
15. In order to avoid the need to license the compilation, artwork, and liner notes, Stargrove must use a different compilation, different artwork, and different liner notes from the original album.
16. Stargrove cannot avoid the need to license the author's copyright through a mechanical licence, as this copyright is still in force, and there is no way to produce a CD with the musical work without either obtaining a licence, or infringing the copyright.

F. No compulsory licensing of mechanical licences

17. The *Copyright Act* does not contain provisions for the compulsory licensing of mechanical licences. In fact, in 1988, Parliament repealed compulsory mechanical licensing provisions.
18. CMRRA does not operate a compulsory mechanical licensing scheme, either *de facto* or *de jure*.

19. CMRRA is a collective society as defined in section 2 of the *Copyright Act*.
20. The *Copyright Act* contains provisions (starting at section 70.1) that permit, but do not require, copyright holders to join collective societies in order to administer their rights under the *Copyright Act* more efficiently.
21. CMRRA can only grant mechanical licences to musical works owned or administered by music publishers that are affiliated with CMRRA and have authorized CMRRA to issue mechanical licences on their behalf.
22. No owner of copyrights in a musical work is required by law to join CMRRA.
23. No publisher client of CMRRA is compelled to license at CMRRA's standard rates. Indeed, ABKCO charges a different rate from CMRRA's standard rates.
24. CMRRA's publisher clients register titles in their catalogues with CMRRA to make them available for licensing. As a practical matter, a CMRRA member could withhold a title from CMRRA simply by not registering it. If a publisher chooses not to register a given title, CMRRA will not consider it to be part of that publisher's catalogue for licensing purposes.
25. Publishers are entitled to instruct CMRRA to exclude particular titles from the regular licensing process, and CMRRA will respect those instructions. For example, CMRRA's mechanical licence agreements ("MLA") exclude "White Christmas" from licensing under CMRRA's regular terms, as the owner of copyright in this title has chosen to license it directly.
26. Publisher clients of CMRRA are entitled to refuse to license particular musical works at particular times or to particular persons.
27. ABKCO regards the right to refuse to license particular musical works as important. For example, some of ABKCO's contracts with artists contain no-coupling clauses that prevent licensing in certain cases. As well, ABKCO may want to avoid releasing a particular CD that could conflict with a band's touring and product release schedules, which could divert the attention of consumers away from the tour and associated product releases and harm the legitimate business interests of the band and the songwriters.

G. No refusal to supply within the meaning of s. 76(a)(ii)

28. On January 16, 2015, ABKCO instructed CMRRA not to grant mechanical licences to the ABKCO Songs to Stargrove.

29. ABKCO did not provide any reason to CMRRA for this refusal as it was not required to.

1. No refusal to supply “because of the low pricing policy” of Stargrove

30. ABKCO denies that it refused to grant mechanical licences to Stargrove because of Stargrove’s low pricing policy.

31. Paragraph 76(a)(ii) of the *Competition Act* constitutes a limited exception to the general freedom of a business to do business, or not to do business, with whomever it wishes, and for any reason whatsoever. Accordingly, Stargrove bears the burden of proving that ABKCO’s refusal to grant mechanical licences was because of its low pricing policy, and ABKCO puts Stargrove to the strict proof thereof.

32. ABKCO is not required by paragraph 76(a)(ii) to have a valid business reason for refusing to grant mechanical licences to Stargrove.

33. Nevertheless, ABKCO had valid and justifiable business reasons for refusing to grant mechanical licences to Stargrove, including the following:

- a) ABKCO does not want its artists or songwriters associated with poor quality recordings, in order to protect their image as well as the relationship between ABKCO and its artists and songwriters.
 - b) Stargrove’s consolidations diminish the value of the original albums.
 - c) ABKCO does not wish to assist Stargrove in making sales of recordings for which the artists and producers would receive no payment.
 - d) ABKCO and its artists do not benefit from promotional expenses for Stargrove’s albums.
 - e) Licensing to Stargrove may have an adverse impact on concert tours in Canada.
- a) *ABKCO does not want its artists or songwriters associated with poor quality recordings***

34. Stargrove’s CDs are necessarily of poor quality.

35. This is because Stargrove does not have access to the original master tapes of the recordings of the ABKCO Songs. These original master tapes have been remastered to

enhance the audio quality. ABKCO has invested hundreds of thousands of dollars in remastering the original master tapes.

36. Because Stargrove does not have access to either the original or remastered master tapes, it is forced to make recordings from vinyl records or other sound recordings dating from 1965 or earlier to produce its CDs. This is referred to as a “needle drop”. The quality of the resulting CD cannot match that of a CD produced by ABKCO from remastered tapes.

37. Stargrove’s overall product, including packaging, artwork, and liner notes, is of poor quality.

38. The presence of inferior quality CDs on the market tends to reduce the perceived value of the musical works embodied on those CDs.

39. ABKCO is concerned that the extremely valuable image of its artists such as The Rolling Stones, and its songwriters such as Mick Jagger and Keith Richards, could suffer if poor quality recordings of their music are sold.

40. An artist’s or songwriter’s image is critical to that artist’s or songwriter’s ability to generate income through existing and new music.

41. For this reason, artists such as The Rolling Stones and songwriters such as Mick Jagger and Keith Richards go to great lengths to protect their image, and they expect ABKCO to police and protect their image in relation to licensing of musical works.

42. The Rolling Stones, in particular, continue to be a working band, with tours planned in 2016. The Rolling Stones and Mick Jagger and Keith Richards have continued to write and record new music, releasing the single “Doom and Gloom” in 2012. They have also announced plans to release a new album of original music in 2016.

43. ABKCO’s artist agreement with The Rolling Stones gives ABKCO the exclusive right to use the name “The Rolling Stones” in conjunction with the manufacture and sale of phonograph records (including CDs) recorded by The Rolling Stones for ABKCO or its predecessor.

b) *Stargrove’s consolidations diminish the value of the original albums*

44. Stargrove’s practice of compiling recordings that originally appeared on different albums diminishes the value of those original albums. Songwriter/artists carefully and passionately choose which compositions to record, which recordings to include together

on an album, and the order in which they appear. Songwriter/artists intend for fans to consume the recordings in this manner.

45. Fans naturally associate those recordings with the original album and their order of appearance on that album.

46. When a label such as ABKCO compiles recordings of its artists in a way different than the original albums, it does so carefully with the intention of the songwriter/artist and original album in mind, and often in consultation with the artist.

47. When recordings from different albums are compiled without thought as to the songwriter/artist's creative intentions or the consumers' associations, as Stargrove has done, the value of the original albums in which the recordings first appear is diminished.

c) *No payment to artists or producers from Stargrove sales*

48. ABKCO's contracts contain certain royalty payment obligations to artists, and producers that continue for as long as ABKCO is selling those artists' recordings. The royalty obligations survive the expiry of copyright on the recording.

49. All of ABKCO's artists receive royalties on the sale of recordings embodying their performances. The rate varies by artist and by media.

50. Producers also receive royalties on the sale of their recordings, typically at a lower rate than royalties paid to artists.

51. Stargrove's business model does not involve making these payments to artists or producers. This means that the artists and producers do not benefit from the sale of Stargrove's albums as they would from the sale of ABKCO's albums.

d) *No promotional spend benefiting ABKCO or ABKCO's artists*

52. Typically 15 to 25 percent of the wholesale selling price of a physical recording is allocated for marketing, advertising, and promotion of the recording.

53. This promotional spend benefits both ABKCO and its artists. It benefits ABKCO by increasing sales of the physical recording. It benefits ABKCO's artists by raising the profile of the artists, which often contributes to the success of their touring and other professional activities, and by putting the artists' music in the hands of people who buy the physical recording.

54. Implicit in Stargrove's pricing model is the lack of any significant promotional spend that would benefit either ABKCO or ABKCO's artists. Stargrove is thus free-riding on promotional spending of others, including ABKCO.

e) *Potential adverse impact on revenue from concert tours in Canada*

55. Concert tours by high profile songwriter/artists are strategically planned to maximize revenue, including revenue that is supplemental to ticket sales, such as CD sales.

56. If ABKCO is forced to grant mechanical licences to Stargrove, then there may be an adverse impact on concert tours, because the songwriter/artist cannot maximize revenue from the concert tour.

57. The concert tour tends to promote sales of CDs. To the extent that sales of Stargrove CDs are promoted, the songwriter/artist is not receiving royalties from those sales, and revenue cannot be maximized.

58. Further, to the extent that sales of Stargrove CDs are promoted by a concert tour, Stargrove is free-riding on the investment of the artist, band, and tour promoters.

59. Moreover, to the extent that Stargrove's CD sales reduce sales of CDs produced or distributed by ABKCO, the songwriter/artist will lose revenue they would otherwise get. Once again, the songwriter/artist cannot maximize revenue from the tour.

60. As a result, not only will foreign songwriter/artists have a reduced incentive to tour in Canada, but Canadian songwriter/artists will as well.

61. This, in turn, may have an adverse impact on competition in the market for live concert performances in Canada.

62. As noted above, The Rolling Stones, in particular, continue to be a working band, with tours and a new album planned in 2016.

2. AMI's refusal to grant mechanical licences was not intended to maintain prices of CDs sold by AMR.

63. AMR sells products such as CDs destined for the Canadian market to a Canadian distributor, who resells the product to retailers.

64. AMR does not impose any resale price maintenance policy, minimum advertised price policy, or any other vertical restrictions on its Canadian distributors or retailers. AMR does not impose any requirements to return unsold product.

65. AMI did not refuse to grant mechanical licences to Stargrove in order to maintain the selling price of AMR's CDs.

3. No coordinated refusal to grant mechanical licences

66. ABKCO made its decision to refuse to supply mechanical licences to Stargrove independently of the decisions made by the other respondents.

67. The decision of other publishers to license, or not to license, musical works to Stargrove has no impact upon ABKCO's decision. The converse is true: ABKCO's decision to license, or not to license, musical works has no impact on the decision of other publishers.

68. This is because the ABKCO Songs are unique. Only ABKCO can license them to Stargrove. Other publishers cannot. It does not make it any easier for ABKCO to refuse to license the ABKCO Songs to Stargrove if other publishers refuse to license their songs; nor does it make it any harder for ABKCO to refuse, if other publishers agree to license.

69. In any event, it is irrelevant to section 76 whether the refusal to supply was coordinated or not. Coordination or lack thereof is not an element of section 76.

4. No resale of mechanical licences

70. Mechanical licences are merely a licence to *produce* CDs. The licence is fundamentally a contract between the owner of the copyright in the musical work (the publisher) and the producer of the CDs (the label). This contract permits the label to produce CDs containing recordings of the musical work.

71. The purchaser of the CD does not acquire a mechanical licence. The purchaser of the CD does not become a party to the contract between the publisher and the label; nor does the label enter into a contract with the purchaser to permit the purchaser to make more copies of the CD for commercial sale.

72. The distributor merely acquires the physical CD and the right to resell it to retailers within a certain geographic market.

73. The consumer who buys the CD merely acquires the physical CD.
74. There is thus no resale of mechanical licences by Stargrove or other CD producers.
75. The purpose of section 76 is to control *resale* price maintenance. As there is no resale in this case, section 76 cannot apply.

5. Mechanical licences are not “products” within the meaning of s. 76

76. Mechanical licences are not “products” within the meaning of section 76 of the *Competition Act*.

77. This is because mechanical licences come into being when they are granted. They are not pre-existing rights over property that are sold. The pre-existing property is the copyright itself. While a copyright might be a “product”, ownership over a copyright is not transferred when a mechanical licence is granted. Rather, a mechanical licence is a contract between two parties granting one party certain non-exclusive rights to use property owned by the other party.

78. Even if a mechanical licence were a “product” within the meaning of section 2 of the *Competition Act*, this product is created whenever a mechanical licence is granted to someone. Consequently, Stargrove’s application asks the Tribunal to order ABKCO to *produce* a product for it. Nothing in section 76 is intended to grant the Tribunal jurisdiction to order a firm to *produce* products for another firm.

H. ABKCO has not induced a supplier to refuse to supply (s. 76(8))

79. CMRRA is not a supplier for purposes of subsection 76(8). CMRRA acts as agent to music publishers, including AMR in licensing musical works. A publisher that instructs CMRRA not to license is a principal instructing an agent, and not one supplier inducing another not to supply. Consequently subsection 76(8) does not apply.

80. ABKCO has not instructed or induced CMRRA not to grant an MLA to Stargrove. ABKCO takes no position on the form of contact between CMRRA and Stargrove, provided that ABKCO maintains its right to agree, or not to agree, to license particular musical works to Stargrove.

I. Copyright owners have the right to maintain the value of their copyrights

81. The *Copyright Act* grants owners of copyright in musical works (and other creative works) the “sole right to produce or reproduce” a work (“le droit exclusive de produire ou reproduire”).

82. The purpose of these exclusive rights is to ensure that creators of musical works (and other works) can be compensated for their creative endeavours. The *Copyright Act* does this by giving the owner of the copyright a monopoly over the copyrighted work, which enables the owner to extract the full value of that work. The *Copyright Act* deliberately restricts competition with respect to the copyrighted work itself. That is, it prevents another person from copying the copyrighted work and selling it in competition with the owner of the copyrighted work.

83. Granting Stargrove’s application would fundamentally negative the rights created by the *Copyright Act*. At bottom, Stargrove’s case is that owners of copyrights in musical works should be forced to license those works to other parties who wish to sell copies of the work in competition with the owner of the copyright. This is the very thing that the *Copyright Act* is designed to prevent.

84. Stargrove asserts that by refusing to grant licences, the owners of the authors’ copyright over the musical work are “artificially extending copyright over public domain recordings”. Stargrove’s position is thus that once the copyright in the sound recording has ended, the author should lose the right to refuse to grant licences to use the musical work, becoming instead subject to compulsory licensing.

85. There is nothing artificial about an author (or the owner of the author’s copyright) asserting their copyright over the musical work. Parliament made an express policy choice in providing for a different term for the author’s copyright than for copyright over the recording.

86. Parliament also made an express policy choice by repealing compulsory licensing provisions in 1988.

87. Stargrove is asking this Tribunal to do something that it does not have jurisdiction to do, that is, to reverse policy choices made by Parliament.

88. Section 76 of the *Competition Act* was not intended by Parliament to negative rights granted by the *Copyright Act* in the manner sought by Stargrove.

J. No adverse effect on competition

89. If AMI refused to supply Stargrove because of its low pricing policy (which is not admitted but is denied), then this refusal has had no adverse impact on competition.

K. Breach of US and Canadian copyright laws

90. Even if Stargrove were to establish all of the elements of its application under section 76, the Tribunal should exercise its residual discretion and deny Stargrove any relief, because Stargrove has violated both US and Canadian copyright laws.

1. Breach of US Federal copyright laws

91. The ABKCO Songs were included on the compilation CD pressed by Stargrove entitled “The Rolling Stones, *Little Red Rooster*” (the “Little Red Rooster Compilation”).

92. Stargrove manufactured, or contracted to have manufactured, approximately 3,000 copies of The Little Red Rooster Compilation in in the United States.

93. Stargrove failed to obtain either a mechanical licence from ABKCO.

94. Stargrove therefore infringed ABKCO’s copyright in the ABKCO Songs, and is liable to ABKCO for damages pursuant to 17 USC § 504 and attorney’s fees pursuant to 17 USC § 505.

2. Breach of US State copyright and unfair competition laws

95. AMR is the sole owner of all rights in and to certain master recordings embodying the performances of The Rolling Stones including, but not limited to (the “AMR Recordings”):

- a) I Wanna Be Your Man
- b) Little Red Rooster
- c) Heart of Stone
- d) What A Shame
- e) Tell Me (You’re Coming Back)
- f) Good Times, Bad Times

- g) It's All Over Now
- h) Time is On My Side
- i) Grown Up Wrong
- j) If You Need Me
- k) Walking The Dog

96. These rights, which continue to exist under copyright and/or unfair competition laws of most states in the United States (and which will continue to be enforceable by the states pursuant to the Copyright Act of the United States), include the sole right to manufacture, distribute or otherwise exploit in the United States and elsewhere, phonorecords (CDs) embodying each of the AMR Recordings.

97. By manufacturing or causing to be manufactured CDs embodying the AMR Recordings in the United States, Stargrove violated the statutory and/or common law copyright laws and unfair competition laws one or more States of the United States. Particulars of which States and which laws were violated will be provided before the hearing of this matter.

3. Breach of the *Copyright Act*

98. Stargrove pressed and distributed CDs, including Little Red Rooster Compilation CD, before obtaining mechanical licences (which licences AMI refused to grant).

99. Consequently Stargrove infringed AMI's copyright in the ABKCO Songs contrary to section 3(1) and 27 of the *Copyright Act*, making Stargrove liable for damages under sections 35 or statutory damages under section 38.1 of the *Copyright Act*.

100. Stargrove knew or ought to have known that making an application for mechanical licences did not mean it could start pressing CDs. The FAQ section on CMRRA's website warns that the licence must be issued before CDs can be pressed:

Can the manufacturer start pressing my product as soon as I send my royalty payment to CMRRA?

No. A licence must be issued to you before your product can be manufactured. The fact that you have sent CMRRA a licence application and a royalty payment does not mean that we will be able to issue the licence you need for your project.

III CONCISE STATEMENT OF ECONOMIC THEORY

A. Mere exercise of intellectual property rights

101. The conduct of the responding music publishers is a mere exercise of intellectual property rights granted by the *Copyright Act* to the creator of musical works to compensate for the initial costs of producing the musical work and reward the creation of valuable musical works.

102. The mere exercise of market power granted through intellectual property rights, including the right not to make mechanical licences available through a collective licensing agency such as CMRRA, the right to charge a royalty rate for mechanical licences higher than the standard rate included in voluntary industry agreements, and the right to refuse to issue mechanical licences to limit distribution and ensure the highest quality product does not constitute anti-competitive conduct under section 76 of the *Competition Act*.

B. The economics of copyrights

103. Copyright law is a means to promote innovation and the efficient allocation of scarce resources. The costs of producing a musical work or sound recording are often high, while the reproduction costs are minimal as it is relatively inexpensive to produce additional copies of CDs. Without the ability to earn revenue in excess of reproduction costs, creators and performing artists have little incentive to produce musical works and sound recordings in the first place.

104. A large fraction of musical works enjoy limited commercial success, while a few “hit songs” by successful artists earn substantial economic rents. To induce the original creation of musical works, *expected* earnings for artists must not only exceed the cost of producing musical works, but also allow artists to earn normal profits to compensate them for their artistic effort.

105. Copyright, a form of intellectual property, confers on the copyright owner an exclusive right to reproduce a musical work. The *Copyright Act* grants right-holders certain exclusive rights regarding the use of the musical work. Specifically, the copyright granted enables the right’s owner to prevent others from making any reproductions or copies of the work or perform it in public, or authorize others to do the same. The exclusive right to reproduction allows the copyright holder to generate economic rents that compensate the

creator for the initial costs of producing musical work and reward the creation of valuable musical works.

106. While users in the short-term might be better off in the absence of copyrights with musical works being freely available, without the prospect of being rewarded creators lack the economic incentive to continue to innovate, create, and share musical works in the future. If creators cannot appropriate the value of the musical work and earn a reward for successful innovation, the work will likely not be produced in the first place. In consequence, fewer valuable musical works will be created. The drop in innovation and shortage of valuable creative work will leave users significantly worse off in the long-term. Copyrights seek to achieve dynamic efficiency by balancing the interests of users of copyrighted musical works with the interests of artists who create original works, require creative control, and must be able to appropriate the value of the original creation to be induced to innovate, create, and share musical works. (Although the maximization of the use of copyrighted material with zero marginal cost of reproduction satisfies static efficiency, too little (future) innovation occurs and the outcome is characterized by a sub-optimal level of production of musical works. Dynamic efficiency refers to the optimal production of creative musical works over time.)

107. As discussed in more detail below, copyrights not only result in the existence of creative works that would not be commercialized otherwise, and therefore increases consumer surplus and social welfare, the ability to withhold the use of copyrights under certain circumstances is economically justified and does not constitute an anti-competitive act from an economic standpoint.

C. The relevant antitrust markets

108. The purpose of defining the relevant market is to identify close substitute products to which buyers would switch in significant volume if a firm were to increase the price of the focal product. Defining the relevant product and geographic markets is typically a first step in assessing whether market participants have the ability to exercise market power. If the conduct is unlikely to create, maintain, or enhance market power, it is unlikely to have an adverse effect on competition.

109. Canada is the relevant geographic market given the geographic scope of copyrights and the lack of geographic differentiation in the pricing of copyright licenses.

110. Stargrove defines the relevant product market as comprising the wholesale market for compact discs containing popular music titles recorded before 1964, where the songs have the following characteristics:

- a) the sound recording is in the public domain,
- b) the musical work fixed on the sound recording remains protected by copyright, and
- c) the sound recording and artist(s) are popular.

111. This product market definition has no basis in economics. It bears no relationship to the fundamental economic question of the substitutability of musical works within the market and their non-substitutability with works outside of the defined market. In that sense, it does not constitute a proper market for antitrust purposes. It lacks an economic basis since neither wholesale buyers nor retail consumers purchase compact discs based on the year of the sound recording, or copyright protection of the sound recording or the musical work. Furthermore, the notion of popularity of the sound recording and artist(s) remains undefined and it is not possible to delineate the relevant sound recording and artists that form this market, and those that are not part of this market.

112. More generally, substitutes from both the wholesale and retail perspective may include any items from the “\$5 bargain bin” which is Stargrove’s niche market. These products may include copyrighted CDs, other types of non-musical recordings, and even items that are priced around the same price point but have nothing to do with music or entertainment and are designed to be purchased on impulse.

D. The copyright holder may choose to opt-out of collective pricing and licensing

113. Both users and holders of copyrights seek ways to reduce transactions costs. Copyright holders can find it beneficial to join into collective management societies since collective administration reduces transaction cost.

114. The CMRRA is a collective music licensing agency issuing licenses to the reproduction right in musical works on behalf of the music publishers (copyright owners) it represents. The typical agreement between copyright holders and CMRRA sets the rate for a mechanical licence to reproduce a musical work on a sound carrier at 8.3 cents per song, with no distinction among musical works. Compared to individualized transactions, such collective pricing of copyrights embodies the lower transaction costs resulting from

the collective management of the copyright and, as a result, provides benefits for both owners and users.

115. However, the *Copyright Act* grants the owner of copyright in a musical work the exclusive right to mechanical reproduction. Hence, a copyright owner may decide not to license musical works under collective pricing, instead choosing to negotiate transactions individually, or not to offer reproduction licenses at all. This is manifested in the express distinction between non-licensable and licensable songs, authorized and non-authorized compositions under a mechanical licensing agreement (MLA). Furthermore, music publishers represented by the collective may not participate in the industry agreement and can charge higher than the standard royalty rate. ABKCO, for example, charges a higher rate than CMRRA's standard rate.

116. From an economic perspective, this means that copyright owners are free to choose the most cost-effective licensing mechanism and optimize their strategy to bring their musical works to market.

117. If participating in a collective society like CMRRA entails as a corollary that a publisher loses the right to refuse to license particular songs to particular firms or at particular times, then publishers will be forced to choose between remaining in the collective society to gain the reduced transaction costs, but losing control over licensing, and leaving the collective society and suffering higher transaction costs, which would be passed on to licensees.

E. Copyright holders have valid economic reasons not to issue mechanical licences

118. Copyright holders of musical works have valid economic reasons to decline to issue mechanical licences. The owner of the copyright to musical work has an economic interest to build or maintain a brand and ensure the product sold is of high quality. Concerns about the value and quality of the product can relate to the quality of sound, production, format, booklet, or packaging, among others. Low-quality releases may taint the brand of the artist or creator of the musical work who may find it in his best economic interest not to license reproduction rights for low-quality releases.

119. Stargrove did not have access to the original master tapes of the sound recordings it included on the CD releases at issue. Rather, the songs have been transferred from a vinyl record to digital audio, a method referred to as a 'needle drop'. The sound quality of a release produced by needle drop is inferior to a digital audio release created from the

original master tapes of the sound recording. The copyright owner has an economic interest to ensure the reproduction of his musical work is of high quality, and may decide to refuse to issue mechanical licences for releases of lower quality.

120. Releases of musical work on compact discs represent only one avenue of copyright commercialization. Copyrights for musical works are also required for cover versions, music synchronization (images and movies), movie soundtracks, “best-of” compilations, and other activities that could be much more lucrative for copyright owners. Since different avenues of commercialization are competing to some extent with each other, a copyright holder might have a valid economic reason to withhold reproduction licenses for musical work in one channel in order not to cannibalize licenses, revenue, and the brand value of the musical work and artists in another commercialization channels. For example, a concurrent release of a best-of music album might cut into copyright revenue from the artist’s musical works prominently featured in a movie playing in theaters. In such instances, it is economically reasonable to withhold reproduction licences for the best-of album in order not to cannibalize the copyright revenues stream from the movie release (synchronization, soundtrack).

121. The timing of a release might also conflict with activities of the performing artists (e.g. touring), releases of other musical works, or other promotional activities around the copyrighted musical work. The copyright owner might find it in his best economic interest to withhold mechanical licences for certain releases of musical works at certain times due to its interference with other marketing activities of the artist.

F. Refusal to issue mechanical licences to stargrove does not have an adverse effect on competition or result in harm to consumers

122. While the refusal to issue mechanical licence might have a direct and substantial impact on Stargrove and its business activities, there is no evidence that the conduct has had, is having, or is likely to have an adverse effect on competition. The refusal to issue mechanical licence to Stargrove does not result in any measurable harm to consumers. The sound recordings at issue continue to be available in various formats and various quality levels, including on CDs and digital audio releases made from remastered tapes (high quality), on vinyl disks, on radio (broadcast, satellite, and streaming).

123. Furthermore, a multitude of substitute products exist, even if not perfect substitutes, that allow consumers to enjoy a wealth of creative work by other artists, or in formats other than low quality CD distribution through Walmart.

124. The ready availability of substitute products and lack of consumer harm is apparent with a properly delineated product market. Products which are erroneously excluded from the plaintiff's narrow product market definition such as other copyrighted CDs and other types of non-musical recordings prevent the exercise of market power by copyright holders and therefore preclude any adverse effects on competition.

G. A mechanical licence is an input of production and is not resold

125. A mechanical licence, granted by the owner of the copyrighted musical work (music publisher) directly or by the licensing collective CMRRA, is an input of production required to manufacture compact discs that include the specific copyrighted musical work. A mechanical licence is not a physical product nor a service, but rather a permission to reproduce a musical work on a sound carrier. No transfer of ownership is associated with this transaction.

126. A permission to reproduce a musical work cannot be resold. A compact disc containing the sound recording of a copyrighted musical work is neither identical nor substantially similar to the mechanical licence permitting reproduction. The compact disc is not a repackaged, reapportioned, processed, or transformed version of the mechanical licence granted by the owner of the copyright to the musical work. Hence, no resale of the mechanical licence occurs when a record label offers a compact disc for sale to retailers or directly to consumers.

IV RELIEF SOUGHT

127. AMR requests that Stargrove's application be dismissed with costs on a lump-sum, solicitor-client basis.

V PROCEDURAL MATTERS

128. AMR requests that this application be heard in English.

129. AMR requests that documents for this application be exchanged and filed electronically.

130. AMR requests an electronic hearing.

April 4, 2016



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COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, RSC 1985, c C-34 (the “Act”);

AND IN THE MATTER OF an application by Stargrove Entertainment Inc. for an order pursuant to section 103.1 of the *Act* granting leave to bring an application under sections 75, 76, and 77 of the Act;

AND IN THE MATTER OF an application by Stargrove Entertainment Inc. for an order pursuant to sections 75, 76, and 77 of the Act;

AND IN THE MATTER OF an application by Stargrove Entertainment Inc. for an order pursuant to section 104 of the Act;

B E T W E E N:

STARGROVE ENTERTAINMENT INC.

Applicant

- and -

**UNIVERSAL MUSIC PUBLISHING GROUP CANADA,
UNIVERSAL MUSIC CANADA INC., SONY/ATV MUSIC
PUBLISHING CANADA CO., SONY MUSIC
ENTERTAINMENT CANADA INC., ABKCO MUSIC &
RECORDS, INC., CASABLANCA MEDIA PUBLISHING,
and
CANADIAN MUSICAL REPRODUCTION RIGHTS
AGENCY LTD.**

Respondents

RESPONSE

of ABKCO Music & Records, Inc.

April 4, 2016

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